

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
N.D. OF N.Y.
FILED

NOV 21 1997

LAWRENCE K. BAERMAN, CLERK
ALBANY

264
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CIVIL ACTION NO.

94-CV-1247 (LEK/DNH)

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTERN PUBLISHING COMPANY, INC.,
I.S.A. IN NEW JERSEY, INC.,
F.I.C.A. a/k/a/ DUTCHESS SANITATION
SERVICES, INC.,
JOSEPH FIORILLO, SR., and
HUDSON VALLEY ENVIRONMENTAL
SERVICES, INC.,

Defendants.

F.I.C.A. a/k/a/ DUTCHESS SANITATION
SERVICES, INC. and JOSEPH FIORILLO,
SR.,

Third-Party Plaintiffs,

v.

FORD MOTOR COMPANY,

Third-Party Defendant.

FORD MOTOR COMPANY,

Fourth-Party Plaintiff,

v.

ALFA LAVAL, INC. a/k/a DELAVAL
SEPARATOR, INC., ET AL.,

Fourth-Party Defendants.

PARTIAL CONSENT DECREE

U.S. DISTRICT COURT
N.D. OF N.Y.
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GEORGE A. RAY, Clerk
ALBANY

240954



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date

PARTIAL CONSENT DECREE

WHEREAS, in response to the release or threat of a release of hazardous substances at or from the Hertel Landfill Superfund Site ("Hertel Site" or "Site"), located in Clintondale, Town of Plattekill, Ulster County, New York, the United States Environmental Protection Agency ("EPA") performed a Remedial Investigation and Feasibility Study ("RI/FS") at the Site between 1989 and 1991 to determine the nature and extent of the contamination and to analyze remedial alternatives for the Site.

WHEREAS, the Remedial Investigation confirmed the presence at the Site of arsenic, lead, trichlorethylene, and methylene chloride, among other hazardous substances, at levels exceeding federal and/or New York State standards.

WHEREAS, after releasing a proposed plan for public comment, EPA issued a Record of Decision ("ROD") selecting a remedy for the Site on September 27, 1991. The remedy selected in the ROD called for, inter alia, constructing a multi-layer cap with gas vents over the landfill, implementing a comprehensive groundwater monitoring program, fencing the 13-acre landfill, pumping and treating the groundwater, and mitigating the potential harmful impacts to the adjacent wetlands.

WHEREAS, on May 6, 1992, EPA notified Western Publishing Company, Inc. (currently known as Golden Books Publishing Company, Inc.) (collectively referred to herein as "Settling Defendant"), among other entities, that EPA considers it to be a potentially responsible party ("PRP") at the Site.

Settling Defendant was requested to undertake the cleanup of the Site, and to reimburse EPA for its response costs, but declined to do so.

WHEREAS, having determined that there may be an imminent and substantial endangerment to the public health, welfare and/or the environment because of an actual or threatened release of a hazardous substance from the Site, and pursuant to its authority under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), EPA issued Administrative Order No. II CERCLA-20217 ("Order") to Settling Defendant and five other PRPs on September 21, 1992. The Order became effective on October 29, 1992, and requires these parties to perform the Remedial Design/Remedial Action ("RD/RA") for the remedy described in the ROD.

WHEREAS, Settling Defendant and five other entities received the Order. Of the Order recipients, only Ford Motor Company ("Ford") has been taking action in response thereto. Settling Defendant informed the United States of Settling Defendant's belief that it had sufficient cause not to comply with the Order.

WHEREAS, the United States of America ("United States"), on behalf of the Administrator of EPA, commenced an action against Settling Defendant, and defendants I.S.A. in New Jersey, Inc., F.I.C.A., Joseph Fiorillo, Sr., and Hudson Valley Environmental Services, Inc., on September 26, 1994, pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"),

42 U.S.C. § 9607, to recover past response costs incurred under Section 104 of CERCLA, 42 U.S.C. § 9604.

WHEREAS, the United States contends that Settling Defendant additionally is liable, pursuant to Section 106(b) and 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606(b) and 9607(c)(3), for civil penalties and punitive damages in connection with its failure to comply with Administrative Order No. II CERCLA-20217, from the effective date of the Order through September 25, 1996, when it entered into an agreement with a contractor to implement remedial action to be taken pursuant to the ROD, in participation and cooperation with Ford, and thereby begin compliance with the Order.

WHEREAS, on May 8, 1996, control of stock in Western Publishing Company, Inc. was transferred to an investment group, and the name of the company was changed to Golden Books Publishing Company, Inc. Golden Books Publishing Company, Inc. enters into this Partial Consent Decree ("Consent Decree") on behalf of itself and Western Publishing Company, Inc.

WHEREAS, by entering into this Consent Decree, Settling Defendant does not admit any liability arising out of Settling Defendant's refusal or failure to comply with the Order.

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties on the issues resolved herein, and

that this Consent Decree is fair, reasonable, and in the public interest.

WHEREAS, the Parties stipulate and agree to the making and entry of this Consent Decree, and the performance of obligations hereunder, without adjudication of any issue of fact or law, and without this Consent Decree, or any part hereof, constituting any evidence or admission of liability or fault as to any allegation, claim, defense, or matter arising out of the pleadings.

NOW, THEREFORE, upon the consent and agreement to this Consent Decree by the Parties, their attorneys and authorized officials, it is ORDERED, ADJUDGED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree, the Settling Defendant waives all objections and defenses that it may have to the jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

2. Venue is proper in this Court pursuant to 42 U.S.C. § 9613(b) and under 28 U.S.C. §§ 1391(b) and (c).

II. PARTIES BOUND

3. This Consent Decree applies to and is binding upon the United States and upon the Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of the Settling Defendant under this Consent Decree.

III. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, et seq.

b. "Consent Decree" shall mean this Partial Consent Decree and any attached appendices.

c. "Day" shall mean a calendar day unless expressly stated to be a Working Day. "Working Day" shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

e. "EPA Hazardous Substance Superfund" shall mean the EPA Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

g. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper case letter.

h. "Parties" shall mean the United States and Settling Defendant.

i. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 27, 1991, by the Regional Administrator of EPA Region II, and all attachments thereto.

j. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

k. "Settling Defendant" shall mean Golden Books Publishing Company, Inc., on behalf of itself and Western Publishing Company, Inc.

l. "State" shall mean the State of New York.

m. "United States" shall mean the United States of America, including its agencies, departments, and instrumentalities.

n. "Order" shall mean Administrative Order Index No. II CERCLA-20217, issued by EPA with respect to the Hertel Landfill Superfund Site on September 21, 1992, to the Settling Defendant.

o. "Site" or "Hertel Site" shall mean the Hertel Landfill Superfund Site, encompassing approximately 80 acres, located approximately one and one-third miles north of Milton Turnpike, in Clintondale, Town of Plattekill, Ulster County, New York.

p. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

V. PAYMENT OF CIVIL PENALTIES

5. Within 15 days after Settling Defendant's receipt of written notice of entry of this Consent Decree, the Settling Defendant shall pay civil penalties to the United States the amount of \$625,000 in settlement of the United States' claims arising out of Settling Defendant's refusal or failure to comply with the Order through September 25, 1996. Payment shall be made by Electronic Funds Transfer ("EFT" or "wire transfer") to the U.S. Department of Justice lockbox bank at the Office of the United States Attorney for the Northern District of New York, according to instructions provided to the Settling Defendant by that Office following notice of entry of this Consent Decree,

referencing Administrative Order No. II CERCLA-20217, the DOJ Number 90-11-2-767A, and the U.S.A.O. File Number 93V0915/001. Any EFTs received at the U.S.D.O.J. lockbox bank after 4:00 P.M. (Eastern Time) will be credited on the next working day. Notice of the EFT and copies of any correspondence from Settling Defendant to the United States Attorney shall also be sent to the United States and EPA as provided in Section X (Notices and Submissions) of this Consent Decree. Settling Defendant shall not deduct payments made pursuant to this Consent Decree for federal tax purposes.

VI. FAILURE TO MAKE TIMELY PAYMENTS/STIPULATED PENALTY

6. If any amounts due to the United States from the Settling Defendant under this Consent Decree are not paid by the required date, the Settling Defendant shall pay as a stipulated penalty \$1500.00 for each day that such payment is late. Stipulated penalties are due and payable within 15 days of the Settling Defendant's receipt from EPA of a demand for payment of the penalties. All payments under this Paragraph shall be paid by certified check made payable to "EPA Hazardous Substance Superfund," shall be mailed to EPA Region II, Attn: Superfund Accounting, P.O. Box 360188M, Pittsburgh, PA 15251, and shall reference Administrative Order No. II CERCLA-20217 and DOJ Case Number 90-11-2-767A. Copies of checks paid pursuant to this Paragraph, and any accompanying transmittal letters, shall be sent to the United States as provided in Section X (Notices and Submissions). Stipulated penalties under this Paragraph shall

accrue as provided above regardless of whether EPA has notified the Settling Defendant of its non-compliance with or violation of this Consent Decree, or has made a demand for payment.

7. In the event that the United States successfully brings an action to collect any payment required by this Consent Decree, the Settling Defendant shall reimburse the United States for all costs of such action, including, but not limited to, costs of attorney time.

VII. COVENANT NOT TO SUE BY PLAINTIFF

8. In consideration of the civil penalties that are paid by the Settling Defendant pursuant to this Consent Decree and in compliance with all the terms of this Consent Decree, and except as specifically provided in Paragraph 9, the United States covenants only not to sue the Settling Defendant for the Settling Defendant's refusal or failure to comply with the Order from November 3, 1992, through September 25, 1996. This covenant not to sue shall take effect upon receipt by the United States of the payments required by Section V of this Consent Decree. This covenant not to sue extends only to the Settling Defendant and does not extend to any other person. This covenant not to sue the Settling Defendant is conditioned upon the complete and satisfactory performance by the Settling Defendant of its obligations under this Consent Decree.

9. Reservations of Rights. The covenant not to sue set forth in Paragraph 8 does not pertain to any matters other than those expressly specified therein. The United States reserves,

and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all other matters not resolved by this Consent Decree, including but not limited to:

- (1) claims for reimbursement of response costs incurred in connection with the Site, as set forth in the September 26, 1994 complaint;
- (2) claims based on a failure by Settling Defendant to meet the requirements of this Consent Decree;
- (3) liability for future disposal of Waste Material at the Site, other than as provided in the ROD, required by the Order, or otherwise ordered by EPA;
- (4) liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- (5) violations of or failure or refusal to comply with the Order after September 25, 1996;
- (6) criminal liability; and
- (7) liability for violations of federal or state law which occur during or after implementation of the Order.

Except as expressly provided in Paragraph 8, nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9607, or any other applicable provision of law, against

Settling Defendant for Settling Defendant's non-compliance with the Order, after the covenant not to sue takes effect pursuant to Paragraph 8. Nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9607, or any other applicable provision of law, against any other person or entity not a party to this Consent Decree.

VIII. COVENANTS BY SETTLING DEFENDANT

10. a. Covenant Not to Sue. Settling Defendant hereby covenants not to sue and agrees not to assert any claims, causes of action, or defenses against the United States with respect to any response actions taken in connection with the Order, including but not limited to:

(1) direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law; and

(2) any claim against the United States, including any department, agency, or instrumentality of the United States, pursuant to CERCLA Sections 107 and 113, 42 U.S.C. §§ 9607 and 9613, related to the Site.

Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. Part 300.700(d).

b. Covenant Concerning Consent Decree. Solely for purposes of any civil, judicial or administrative action by the United States to enforce this Consent Decree;

(1) Settling Defendant agrees not to assert that EPA's decision in selecting the response action set forth in the Order is arbitrarily and capricious or is otherwise not in accordance with law; and

(2) Settling Defendant agrees not to contest that the relief set forth in the Order and ROD is necessary to abate an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance at the Site.

11. Reservation of Rights. The covenants set forth in Paragraph 10 do not pertain to any matters other than those expressly specified therein. The Settling Defendant reserves, and this Consent Decree is without prejudice to, all rights and defenses against the United States and any other party with respect to all other matters. Except as expressly provided in this Consent Decree, nothing contained herein shall in any way limit or restrict the rights of Settling Defendant to fully defend any action, either judicial or administrative, brought by the United States under Sections 104, 106, and 107 of CERCLA,

42 U.S.C. §§ 9604, 9606 and 9607, or any other provision of law, against Settling Defendant, or the rights of the Settling Defendant to pursue claims against any other person or entity not a party to this Consent Decree.

IX. EFFECT OF SETTLEMENT

12. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. The Parties hereto expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Hertel Site against any person not a party hereto.

13. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Hertel Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Section VII (Covenant Not to Sue by Plaintiff).

X. NOTICES AND SUBMISSIONS

14. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successor(s) give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendant, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044
Attn: 90-11-2-767A

James C. Woods
Assistant United States Attorney
United States Attorney's Office, Northern District of New York
United States Courthouse
445 Broadway, Room 231
Albany, NY 12207

As to EPA:

Hertel Landfill Superfund Site Attorney
New York/Caribbean Superfund Branch
Office of Regional Counsel
290 Broadway, 17th Floor
New York, NY 10007-1866

As to Settling Defendant:

Steven M. Oster, Esquire
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

Dale C. Gordon, Esquire
Vice President and General Counsel
Golden Books Publishing Company, Inc.
1220 Mound Avenue
Racine, WI 53404

XI. EFFECTIVE DATE

15. This Consent Decree shall become effective upon the date of its entry by the Court.

XII. RETENTION OF JURISDICTION

16. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

XIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

17. This Consent Decree shall be lodged with the Court for a period of thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. The Settling Defendant consents to the entry of this Consent Decree without further notice.

XIII. APPROVAL AND ENTRY BY THE COURT

18. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of either Party and the terms of

the agreement may not be used as evidence in any litigation between the Parties.

19. Except as set forth in Paragraph 5 hereof, entry into this Consent Decree shall not constitute an admission, adjudication, or waiver of any right or defense of Settling Defendant with respect to any present or future alleged liability for conditions at or near the Site; or of any fact or conclusion of law set forth herein; or evidence of any wrongdoing on the part of Settling Defendant or any person or entity acting on its behalf.

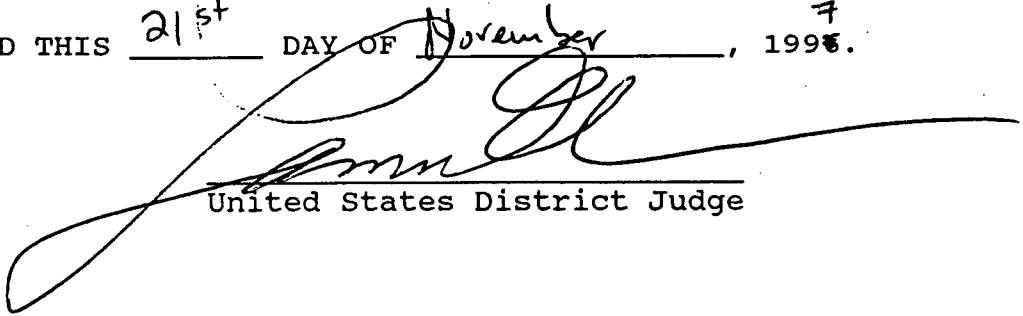
XIV. SIGNATORIES/SERVICE

20. The undersigned representative of the Settling Defendant to this Consent Decree, the EPA, and the United States Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

21. The Settling Defendant has identified, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant waives any objection to service made by mail to the person so identified.

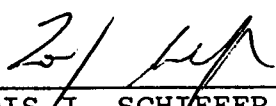
22. This Consent Decree may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

SO ORDERED THIS 21st DAY OF November, 1997.


United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Western Publishing Company, Inc., et al., Civil Action No. 94 Civ. 1247 (LEK/DNH), relating to the Hertel Landfill Superfund Site.

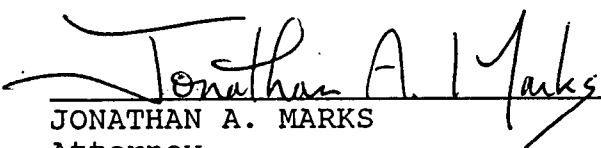
FOR THE UNITED STATES OF AMERICA



LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, DC 20530

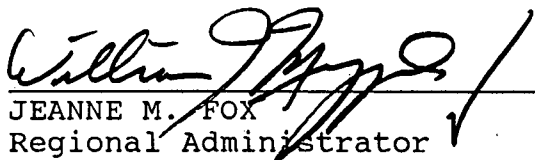
THOMAS J. MARONEY
United States Attorney for the
Northern District of New York

JAMES C. WOODS
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United States Courthouse
445 Broadway, Room 231
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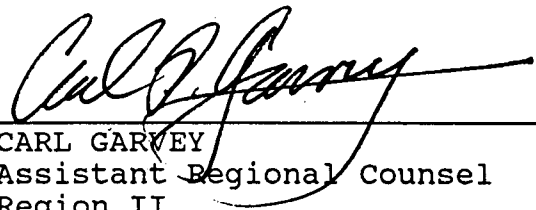


JONATHAN A. MARKS
Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, DC 20530

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JEANNE M. FOX
Regional Administrator
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New York, NY 10007-1866



CARL GARVEY
Assistant Regional Counsel
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FOR DEFENDANT GOLDEN BOOKS
PUBLISHING COMPANY, INC.

Date: Sept 30, 1996



Steven M. Oster, Esquire
Counsel
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

Agent authorized to accept service on behalf of above-signed
Party:

Steven M. Oster, Esquire
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036